In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-389

JAMES STRONG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the Indian Claims Commission and the Court of Claims erred in denying their claims based on non-exclusive occupancy of land. Petitioners also contend that the Commission and the Court of Claims erred in their interpretation of portions of two treaties concerning the Post of St. Vincennes tract reserved by the United States.

By the Treaty of Greeneville of August 3, 1795, 7 Stat. 49 (Pet. App. C, 108a-120a), 15 groups of Indians ceded to the United States approximately 20 million acres of land, in Ohio, Indiana, Illinois and Michigan (see Treaty of Greeneville, Article III; Pet. App. C, 109a-112a). In return, the United States, among other things, agreed to relinquish its claims within a large described area except for the Post of St. Vincennes on the Wabash River and other listed tracts (Treaty of Greeneville Article IV; Pet. App. C, 112a-113a). Under Section 2 of the Indian Claims Commission Act, 60 Stat. 1050, 25 U.S.C.

70a, eighteen present day tribes brought claims before the Indian Claims Commission asserting that their ancestors had aboriginal or recognized title at the date of the Treaty to portions of the land ceded by the Treaty and that they received inadequate compensation for the lands given up.[1]

Before reaching the question of adequacy of compensation, the Commission held (Pet. App. B, 14a-18a) that the ancestors of the petitioner tribes did not have recognized title to the lands in question before the Treaty of Greeneville and that the Treaty did not recognize such title. The question then became whether, and to what extent, the various tribes had aboriginal title to the land in question, that is, whether they possessed it sufficiently to give rise to a claim under the Act.

The Commission, after extensive findings of fact (Pet. App. B, 43a-107a), distinguished between areas where no tribe had permanent settlements or control for any extensive period of time, and areas that were under the exclusive control of a particular tribe.[2] As to the latter, it recognized aboriginal title giving rise to a claim under the Act, but as to the former it denied the claims. There were substantial areas within each category (see Pet. App. B, 39a-42a).

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[1]Twelve of these tribes have joined in the present petition. Another tribe has petitioned separately: *Pottawatomie Tribe of Indians, et al.* v. *United States,* No. 75-438; and two other tribes have joined in a third petition, *Hannahville Indian Community, et al.* v. *United States,* No. 75-458.

[2]The Commission rejected on factual grounds the contention that a confederation of tribes controlled certain areas (Pet. App. B, 18a-21a).

The Commission also held (Pet. App. B, 37a-38a) that the tribes, by the Treaty of Greeneville, agreed to the reservation by the United States of the Vincennes tract and that the later delineation of boundaries by the Treaty of Fort Wayne of June 7, 1803 (7 Stat. 74; Pet. App. E, 128a-131a) did not give rise to a claim under the Act. The Commission also found that "no tribes possessed aboriginal title to the Vincennes Tract at the time of the 1795 Greeneville Treaty." Finding 32, Pet. App. B, 98a.

On interlocutory appeals, the Court of Claims affirmed the holdings of the Commission (Pet. App. A, 1-26), with the sole exception of its finding of Indian possession of certain "old Wea towns," as to which it remanded the case to the Commission for further findings (Pet. App. A, 22). Since the question of compensation had not been reached by the Commission, the court also remanded the case to the Commission for further proceedings on that issue in regard to the land as to which aboriginal title had been recognized (Pet. App. A, 26).

1. The decision of the Court of Claims is correct and presents no issue warranting review by this Court. Petitioners contend (Pet. 9-13) that the Commission and the court below improperly denied their claims to possession of areas that were not possessed exclusively by a single tribe. The decisions below, however, carefully applied existing law, including recognition of possible joint occupancy, to the facts of the case.

The Court of Claims stated the requirements to prove aboriginal title as follows (Pet. App. A, 4):

> "[t]o be accepted under the Indian Claims Commission Act, aboriginal title must rest on *actual, exclusive and continuous use and occupancy 'for a long time' prior to loss of the property.* [Emphasis supplied.]"

This recognized test of aboriginal title has been consistently used and approved both before and after the enactment of the Claims Commission Act.[3] The court pointed out, however, that two or more tribes could have joint aboriginal title if they shared land through a "joint and amical" "close" relationship (Pet. App. A, 6-7), but, applying this test, the court affirmed the Commission's finding that that degree of relationship did not exist here.

Moreover, another element of the rule—that the occupancy must be for a long time—also defeats petitioners' claims. The rule as stated by this Court is that the right must be based on "immemorial occupancy"[4] or "aboriginal possession."[5] In either event, the undisputed findings of the Commission are that the area in question was vacant from the latter part of the 17th century until 1730, when ancestors of petitioners first started to move into it. However, by the 1780's they had abandoned it again, albeit in part under military pressure (Pet. App. B, 51a-70a).

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[3] *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 338-339; *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 345; *Buttz* v. *Northern Pacific R.R.*, 119 U.S. 55, 69-70; *Worcester* v. *Georgia*, 6 Pet. 515, 559; *Johnson and Graham's Lessee* v. *McIntosh*, 8 Wheat. 543; *Confederated Tribes of Warm Springs Reservation* v. *United States*, 177 Ct. Cl. 184, 194; *Red Lake, Pembina and White Earth Bands* v. *United States*, 164 Ct. Cl. 389, 393; *Spokane Tribe* v. *United States*, 163 Ct. Cl. 58, 66; *Sac and Fox Tribe* v. *United States*, 315 F.2d 896, 902-903 (Ct. Cl.), certiorari denied, 375 U.S. 921; *Quapaw Tribe* v. *United States*, 120 F. Supp. 283, 286 (Ct. Cl.); *Snake or Piute Indians* v. *United States*, 112 F. Supp. 543, 551-552 (Ct. Cl.).

[4] *Northwestern Bands of Shoshone Indians* v. *United States*, *supra*, 324 U.S. at 338.

[5] *United States* v. *Santa Fe Pacific R. Co.*, *supra*, 314 U.S. at 345.

2. The issues presented by the case are not of continuing importance. Aboriginal title is not an interest in land protected by the Fifth Amendment[6] and is compensable only because Congress, through the Indian Claims Commission Act, has provided compensation for loss of interests beyond those ordinarily recognized by law. See 25 U.S.C. 70a. All claims under the Indian Claims Commission Act, however, had to be filed before August 14, 1951.[7] Litigation under the Act is drawing to a close after almost 30 years, during which Indian title to approximately 1 billion acres has been tried. Indeed, the Commission, under present law, is due to expire on April 10, 1977.[8] The bulk of the litigation under the Indian Claims Commission Act has thus already been decided under the rules applied here by the Commission and the Court of Claims. If the definition of aboriginal title were now substantially broadened in regard to joint occupancy few, if any, pending cases would be affected.

3. Petitioners' second contention (Pet. 8) concerns the extent of the area of land reserved by the United States around the Post of St. Vincennes. The Treaty of Greenevi[l]e provides in Article IV (Pet. App. C, 112a-113a) that in relinquishing its claim to various areas, the United States expressly reserved "[t]he post of St. Vincennes on the river Wabash, and the lands adjacent, of which the Indian title has been extinguished." A dispute subsequently arose over the area intended to be covered by the Vincennes reservation

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[6] *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279.

[7] Sec. 12, 60 Stat. 1052, 25 U.S.C. 70k.

[8] Act of March 30, 1972, 86 Stat. 114, 25 U.S.C. (Supp. III) 70v.

in the Treaty of Greeneville. It was resolved by the Treaty of Fort Wayne (Pet. App. E, 128a-131a), in which a metes and bounds description was given. The area thus described contained 1,800,000 acres. The Commission found (Finding 32, Pet. App. B, 98a):

> The evidence herein indicates that the Indians at Greeneville in 1795 did not contest the prior extinguishment of their claims to the area around Vincennes. Furthermore, although the evidence indicates that in the proceeding leading up to the 1803 Fort Wayne Treaty the Indians did at first protest the extent of the prior extinguishment (which protest Governor Harrison after investigation agreed with), the Indians did ultimately agree that the area described in the first article of the Fort Wayne Treaty was the area which would be considered equivalent to that area described in the 1795 Greeneville Treaty.

The Court of Claims correctly affirmed this finding, pointing out that it is a common practice to rely upon a later treaty to define an indefinite cession in an earlier treaty (Pet. App. A, 16).

The issue presented on the Vincennes tract, moreover, is a narrow question of treaty interpretation affecting no claims other than those of two of the petitioners herein.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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